FILE COPY

No. 69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 107-112) is reported at 272 F. 2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 2-14) in the unfair labor practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 14-20) is reported at 119 NLRB 594.

JURISDICTION

The court below entered its judgment on December 28, 1959 (R. 113-114). The petition for a writ of certiorari was granted on May 31, 1960, 363 U.S. 802 (R. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statutory provisions directly and indirectly involved are set forth in the Board's brief, pp. 2-3, 53-56. Respondent also relies on Section 102.73 of the Rules and Regulations of the Board in effect at the time of the proceedings herein before the Board (App. C, *infra*).

QUESTION PRESENTED

Whether Section 10(k) of the National Labor Relations Act and Section 102.73 of the Board's Rules and Regulations in effect at the time of the Board proceedings in this case required the Board to determine a dispute over who was entitled to the assignment of a specific work task.

STATEMENT OF THE CASE

This case arose out of a dispute concerning the lighting on a television show to be broadcast on April 21, 1957 by the Columbia Broadcasting System, Inc. ("CBS"), the only employer involved in this proceeding. Two unions with which CBS had contracts claimed the work for the employees they represented.[1] Because the dispute could not be settled, the telecast of the show was called off.

The present proceeding was started on April 26, 1957 when CBS filed a charge with the Board, asserting that respondent had violated Section 8(b)(4)(D) of the Act (R. 14-15). Pursuant to Section 10(k), a hearing was held before a hearing officer. The Board thereafter issued its Decision and Determination of Dispute (R. 14-20.)

As the Board found in that Decision, respondent was certified by the Board in 1952 as the statutory representative of certain CBS technicians (R. 16). Respondent and

[1] These were (1) Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO, respondent herein, and (2) Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (herein called "IATSE").

CBS entered into an agreement on May 1, 1956, to run to January 31, 1958, covering specified technical employees (R. 16). CBS entered into a contract with IATSE on June 23, 1955, to run until December 31, 1957, covering stage hands (R. 16). (IATSE does not hold any certification at CBS.)

In the negotiation of these contracts, both unions attempted to get CBS to settle an issue that had plagued the industry for years—the assignment of employees to the operation of lighting on "remote" television shows, that is, shows originating outside of a regular television theatre or studio (R. 21). As to such broadcasts, there had been a "running dispute" for years, with the employer handling assignments on a "case-by-case" basis (R. 75, 29, 78).[2] As each of the two contracts came up for negotiation, the union involved urged CBS to settle the matter by expressly making its contract applicable to the disputed work (R. 27-31, 67). CBS refused on the ground that it was "not free to make a commitment where there were conflicting claims" (R. 28). Because the three parties could not agree, the whole thorny problem "was left as it had been before" (R. 30).

The broadcast of the Antoinette Perry ("Toni") Awards of the American Theatre Wing, scheduled for April 21, 1957, which originated at the Waldorf-Astoria Hotel, fell predictably into this disputed and still unresolved area (R. 21-22, 26). CBS decided that the work should be "assigned to IA [TSE]" and so informed respondent (R. 22, 50, 51-52).

The Board found, despite some ambiguity as to the events, that representatives of respondent refused to operate camera equipment for the show unless the technicians it represented were also allowed to do the lighting and that, as a result of this refusal, the television broad-

[2] The CBS vice-president in charge of labor relations, W. C. Fitts, Jr., testified that the dispute had been going on ever since he joined the Company in 1950 (R. 21, 75).

cast of the show was cancelled (R. 17-18).[3] For the purposes of this proceeding only, respondent concedes the correctness of that finding.

At the Section 10(k) hearing, the CBS official who made the assignment to IATSE testified that he had done so on the basis of "the general criteria that we had used in the past" (R. 23, 78-79, 81-84). However, respondent was not allowed to go behind that statement. It offered to show that the lighting of most of the remote broadcast in the past had been done by its members but its offers were consistently rejected (R. 79-83, 84, 88-94).[4] This was done under the Board's theory that the resolution of such disputes must be left entirely to the employer. As the hearing officer put it, "CBS is at liberty to go on making its decisions on a day-to-day basis" (R. 81); "they can be as inconsistent as they please" (R. 83). It was even possible for CBS to refuse to specify the manner in which it made these assignments so important to the men involved (R. 84-85).

In its Decision and Determination of Dispute, the Board declined to determine the dispute concerning the lighting on remote telecasts, saying that an employer is free to make work assignments in the absence of a Board order or certification or a union contract covering the work in question (R. 18-19). Accordingly, the only formal finding it made was that respondent was not entitled, by means forbidden by Section 8(b)(4)(D), to force CBS to assign remote lighting to its members rather than to other CBS

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[3] It was suggested that the telecast proceed using only the existing house lights, but this was vetoed by IATSE (R. 85-86).

[4] Respondent offered to prove, by witnesses and documentary evidence, that lighting of remote telecasts had generally been done by IBEW technicians; that, during the 12 months prior to the first hearing, there had been about four remote telecasts a week; that the lighting on 95% of these telecasts had been done by IBEW men; that the "Toni" Awards show at the Waldorf Hotel was similar to other shows broadcast from hotels which CBS had assigned to IBEW men; and that CBS departed from its normal practice in this case (R. 81-82).

employees who are members of IATSE (R. 19). It added that its action was not "to be regarded as 'assigning' the work in question to Local 1 [of IATSE], as we are not called upon to pass on that question" (R. 19).

On being informed by respondent that it would not comply with this "determination" (R. 71), the Board processed the CBS charge through the usual steps under Section 10(b), including a brief hearing, a Trial Examiner's Intermediate Report (R. 2-11) and a Board Decision and Order (R. 11-14). At this second hearing, respondent renewed its offers of proof (R. 101-106). It also moved for dismissal of the Board's complaint because of the Board's failure to make a proper determination under Section 10(k) and for remand of the matter to the Board to make such a determination (R. 98-100). The Trial Examiner rejected the offers and denied the motions (R. 100, 103). In its decision, the Board upheld these rulings of the Trial Examiner (R. 12) and adopted his finding that respondent had violated Section 8(b)(4)(D) by encouraging CBS employees to engage in a concerted refusal to perform services with the object of forcing CBS to assign remote lighting to members of respondent rather than to members of IATSE (R. 8-9). It ordered respondent to cease and desist from such concerted refusals and to post appropriate notices (R. 12-13).[4]

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[4] The Board's order provides that respondent shall cease and desist from taking certain action designed to force CBS to "assign the work of operating lights on remote television pick-ups to members of the Respondent Union rather than to members of IATSE (R. 13). It is the position of respondent, presented to the court below, that this order is too broad. Respondent has claimed remote lighting assignments only on those remote telecasts which are not staged at or telecast from an IATSE house or do not involve remote telecasts of shows which originally originated from the studio but which are removed to remote locations on special occasions.

If the decision below is reversed, we suggest that the case be remanded to the court below for disposition of this issue.

A petition for enforcement of this order was thereafter filed by the Board (R. 72-73), but the court below denied the petition on the sole ground that the Board was barred from proceeding on the charge of a violation of Section 8(b)(4)(D) because it had not complied with the mandate of Section 10(k) that it determine the dispute out of which the charge arose. In the court's opinion, "under the Board's view that Congress has left the determination of disputes involving work assignments to the employer, the §10(k) hearing and determination become superfluous" (R. 109). "The scheme of §10(k) is to provide an opportunity for the private adjustmen' of disputes causing jurisdictional strikes; but in the absence of such adjustment, the Board itself is to determine the disputes . . . Since private adjustment can only envision agreement as to which group is entitled to the work, the Board is required to make this determination where private negotiation proves unsuccessful" (*ibid*). Accordingly, it was not enough, in the court's view, for the Board to have simply determined that respondent was not entitled to strike for the work by virtue of a contract or Board order or certification.

SUMMARY OF ARGUMENT

A. Section 8(b)(4)(D) of the Act makes jurisdictional strikes unfair labor practices. Section 10(k) "directs" the Board to "determine" the "dispute out of which" such an unfair labor practice "shall have arisen." The plain meaning of these words is that the Board's determination under Section 10(k) is to be of the underlying jurisdictional dispute, not of the unfair labor practice issue.

The Board, in effect, urges that the natural, easily understood meaning of Section 10(k) should be set aside because it leads to contradictory and unfortunate results. It fails to make a sufficient showing of a need to rewrite the law Congress enacted or of a power in the agency to do so.

B. The Board's interpretation of Section 10(k) has been rejected by three Courts of Appeals and supported by one. The former have found the Board's administration of Sec-

tion 10(k) contrary to the language of the Act, its legislative history and the Board's own Regulations.

C. The legislative history of Section 10(k) shows with more than usual clarity that Congress expected the Board to make determinations, in the nature of arbitration awards, of disputes over work assignments. Congress specifically rejected a simple prohibition of jurisdictional strikes and inserted a provision for "compulsory arbitration" of work disputes which has no reason for being in the Act if it has not achieved that end. The Board's argument that the decision to have administrative determinations of work disputes was abandoned in the final stages of action on the bill is based on surmise and is contrary to the record. Its alternative hypothesis as to what Congress intended has no support in the debates or reports.

D. The Board has not been consistent in its interpretation of Section 10(k). The Rules it adopted in 1947, immediately after the section was adopted, are the best evidence of the Board's contemporaneous understanding of its thrust. Those Rules clearly contemplated Board determinations of work assignment disputes of the kind it now declines to make. The Board's first decision under Section 10(k), in 1949, made such a determination. It was only thereafter that it adopted its present policy. Since then, the policy has forced it into inconsistencies, requiring distortions of other sections of the Act which would be unnecessary if it were administering Section 10(k) according to its plain terms.

There has been no approval of a "consistent" interpretation of Section 10(k) by Congress. The 1949 debates which indicate Congressional satisfaction with the operation of the section occurred before the Board adopted its present policy. The labor act adopted in 1959 was not a general overhaul of the earlier law and, in any case, its adoption took place at a time when the judicial interpretation of Section 10(k) was consistently opposite to that of the Board.

E. The Board's substitute interpretation of Section 10(k) makes proceedings under that section a mere dress rehearsal for subsequent unfair labor practice proceedings. The same issue is decided in the 10(k) hearing as in the 8(b)(4)(D) hearing. The Board's suggestion that the holding of two hearings on the same issue increases the likelihood of informal settlement is not borne out by experience. The lack of specific standards for Board determinations under Section 10(k) does not justify equating decisions under that section with those under Section 8(b)(4)(D). The Board can apply appropriate standards, as it has for 25 years under the statutory provision directing it to determine appropriate bargaining units.

F1. It is not necessary to distort Section 10(k) in order to prevent conflict with Section 303. This Court has established that the remedies under the two sections are independent. Congress expected divergent results under Sections 8(b)(4) and 303 and they are inevitable even under the Board's policy.

2. Jurisdictional strikes are not violations of Sections 8(b)(4)(D) or 303 if the employer is not conforming to a Board order determining bargaining representatives. A 10(k) determination is such an order. It has the effect not of directing the employer to make a particular work assignment but of establishing whether a particular strike is legal.

3. The enforcement provisions of Section 8(b)(4)(D) and 303 are designed to achieve different purposes. The Board's treatment of Section 10(k) as a mere "extra procedural step" is compelled by the Board's pursuit of a "substantive symmetry" that Congress never intended.

G1. The Board's argument that its interpretation of Section 10(k) prevents discrimination based on union membership, in violation of Section 8(a)(3) and 8(b)(2), has no validity in the instant case. In situations such as this, where the work dispute is between two unions, both with members in the plant, there are a number of ways the Board can

make determinations without causing such discrimination. As to the more common case, where one of the contending unions has no members in the plant, the administrative process permits development of appropriate rules for that situation. For example, if Board determinations are made in terms of a particular craft, the employer will remain free to employ any qualified member of that craft regardless of his union affiliation.

2. However, if the natural meaning of Section 10(k) does result in discrimination that would otherwise be a violation of Sections 8(a)(3) or 8 (b)(2), the court below was correct in holding that Section 10(k) controls. Nothing in the history of the Act shows that the principle embodied in Sections 8(a)(3) and 8(b)(2) is subject to no exception.

3. The employer's right to assign work is not absolute. Congress could and did limit it in the special case of jurisdictional disputes. Indeed, it is limited even under the Board's interpretation of Section 10(k).

H. The Board's interpretation frustrates the purpose of Section 10(k). It does not promote informal settlements. The rate of settlement in 8(b)(4)(D) cases is not significantly better than in other cases.

The Board's interpretation does not discourage strikes. Moreover, a recent amendment to the Act eliminates the need for a union to strike to get a 10(k) determination.

By giving the final say to the employer, the Board invites prolongation of chronic disputes. Its interpretation gives employers a strong inducement not to participate in procedures for voluntary settlement of jurisdictional disputes.

Virtually all independent comment on the Board's administration of Section 10(k) has been adverse, from the points of view of both law and practical results.

The continuation of jurisdictional disputes among the employees of the employer here involved pointedly reveals the need for determination of work disputes by the Board

in the manner intended by Congress, in order to achieve the legislative goal of reducing this form of industrial strife.

ARGUMENT

The decision of the court below that Section 10(k) contemplates "affirmative Board adjudication of disputed work allotments" is correct because it gives, as the Board's policy does not, substance and meaning to the plain language and intent of that section and because it avoids, as the Board's policy does not, rendering superfluous the proceedings under that section. Moreover, the view of the court below is supported by the decisions and reasoning of the Courts of Appeals for the Third and Seventh Circuits in *NLRB* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428 (Hake)* 242 F. 2d 722 (C.A. 3); *NLRB* v. *United Brotherhood of Carpenters and Joiners of America (Wendnagel)*, 261 F. 2d 166 (C.A. 7).

A. IN 10(k) PROCEEDINGS, THE BOARD MUST DETERMINE THE DISPUTE "OUT OF WHICH" THE UNFAIR LABOR PRACTICE AROSE

Section 8(b)(4)(D) makes a jurisdictional strike an unfair labor practice. Section 10(k) directs the Board to "determine" the "dispute" out of which "such unfair labor practice shall have arisen." Manifestly, the "dispute" referred to is not the unfair labor practice, because that arises "out of" the dispute. The "dispute" can only be the jurisdictional dispute that prompted the strike. Section 10(k) further says that the 8(b)(4)(D) charge shall be dismissed if the parties voluntarily adjust the "dispute" or comply with the decision of the Board. Again, the "dispute" here is something separate from the unfair labor

practice. Both here and in the first sentence of the section, the reference is to the jurisdictional dispute.

Thus, the plain language of Section 10(k) directs the Board to make a determination of the underlying dispute over work assignments. As the Third Circuit said in the *United Association* case, *supra*, "We think this is the only sensible reading of the simple and unambiguous language which Congress employed" (242 F. 2d at 725).*

The Board nevertheless urges that the plain meaning of the statute should be distorted for a variety of theoretical and practical reasons. We submit that its arguments should be rejected on the same ground that a similar argument was rejected by this Court in *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355 (1949). There, as here, the Board argued that the normal interpretation of plain statutory language created "what the Board conceives to be an anomalous situation" and that it properly adopted a different interpretation to "prevent circumvention" of other sections of the Act (338 U.S. at 362). This Court held, however, that such arguments did not warrant rewriting the Act, saying, "It is not necessary for us to justify the policy of Congress" (*Id.* at 363).

B. THE INTERPRETATION OF SECTION 10(k) URGED HERE IS SUPPORTED BY DECISIONS OF THREE COURTS OF APPEALS

The question here involved has been presented to the Courts of Appeals for the Second, Third, Fifth and Seventh Circuits. The Second Circuit in the instant case and the Third and Seventh Circuits have upheld the views here

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* Even the Board's brief yields to the insistent thrust of the statutory language. It states that the aim of Section 10(k) is to encourage voluntary settlement of the "underlying jurisdictional dispute," which can only be the work dispute, and then says that, absent such settlement, the Board makes "a determination respecting it" (p. 21), but that is just what it does not do under its present policy.

urged by respondent, with only the Fifth Circuit holding the other way.

In *NLRB* v. *United Association of Journeymen, supra,* charges under Section 8(b)(4)(D) were filed by a union and an employer against another union. The Board's determination, pursuant to Section 10(k) had been that the respondent union had acted illegally. However, in accordance with its current policy, the Board had taken no affirmative action with respect to the challenged work assignment. The respondent union in that case ignored the Board's subsequent order under Section 8(b)(4)(D) and the General Counsel petitioned for enforcement.

The Court of Appeals for the Third Circuit denied the Board's application on the ground that the Board had acted improperly under Section 10(k) in failing to decide the underlying jurisdictional dispute on the merits. The Court referred to the unchallenged interpretation of Section 10(k), running throughout the legislative history of the provision, that a determination of the jurisdictional dispute is required of the Board when the parties themselves are unable to resolve their differences. Reference was also

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[7] The Board argues that the decision of the Ninth Circuit in the *Juneau Spruce* case (189 F. 2d 177) "apparently" upholds the Board's interpretation of Section 10(k) (pp. 18, 32). The words quoted by the Board at page 32 follow a passage in which the Court reviewed the facts of the case, including the employer's consistent course of dealing with the union to which it assigned the work. The court then said (189 F. 2d, at 188): *In view of these circumstances and* under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of work by *appellee*", i.e., the employer in that particular case. The Board's omission of the words in italics wrongly creates the impression that the court was laying down a general rule that employer assignments are inviolate. The full quotation makes it clear that the court reached no broad conclusion that the Board can never depart from the employer's assignment. In fact, the court noted that the Board did that in the *Winslow* case (discussed *infra*) (189 F. 2d, at 187-188).

made to the rules of the Board itself, and the plain meaning of the statutory language. Whether or not that plain meaning appeared to do violence to other sections of the Act, held the Court, Section 10(k) had to be followed in accordance with its terms. As the court said (242 F. 2d. at 726):

> The scheme makes sense only if the first hearing under Section 10(k) is concerned with an arbitration type settlement of the underlying jurisdictional dispute, so that a subsequent Section 10(c) unfair labor practice adjudication becomes necessary only if a union shall fail to respect the jurisdictional boundary which the Board has delineated.

This case was followed in *NLRB* v. *United Brotherhood of Carpenters, supra*, where the Court of Appeals for the Seventh Circuit also found that the Board's 10(k) hearing was insufficient and lacked a determination of the underlying jurisdictional dispute. Here, the Board issued a "determination" similar to that in the instant case, and failed to make an affirmative award of the disputed work assignment. The Court of Appeals felt impelled to look to the Rules of the Board, as well as the statute, to find whether the Board had granted the requisite hearing to the parties.

The court was primarily concerned with Section 102.73 of the Rules, which is also involved in the case at bar.[8] It found that the Board had failed to comply with Section 102.73, since there was a failure to certify the "particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue" (261 F. 2d. at 170). It held that the rule "was as binding

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[8] At the time of the Section 10(k) hearing in this case, Section 102.73 of the Board's Rules and Regulations read, in pertinent part:

> "Upon the close of the hearing, the Board shall proceed ***to *certify* the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter."

upon the Board itself as it was upon any other person or organization." While the court noted the Board's reluctance to interfere with the employer's prerogative of assigning work, it evidently did not deem this reluctance to be controlling over the plain meaning of the rule.

As to the language of the rule permitting "other disposition of the matter," on which the Board relied, the court said that "nothing in the record suggests that the Board attempted or intended to make any disposition of the matter other than to determine it" (261 F. 2d. at 170).*

C. THE LEGISLATIVE HISTORY OF SECTION 10(k) SUPPORTS THE DECISION BELOW

We have shown that the result reached by the court below is clearly required by the unambiguous language of the Act. That language does not need to be buttressed by any aids to construction. However, since the Board insists

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* Guy Farmer, chairman of the Board from 1953 to 1955, who accepted the Board's policy while holding that position, has since concluded that "it now begins to appear likely that the Board has done less than it was intended to do under Section 10(k)." Farmer and Powers, *The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes*, 46 Va. L. Rev. 660, 691, also 682-3, 684 (1960). Others have rejected its conclusion that the terms of the statute require its narrow view of Section 10(k). Feldesman, *Work Assignment Disputes as Bargaining Unit Issues*, 6 Syr. L. Rev. 239, 253-5 (1955); Testimony of Archibald Cox at hearings on Proposed Revision of the LMRA, 83d Cong., 1st Sess., Pt 4, 2406, 2428 (1953); Dunlop, *Jurisdictional Disputes*, in NYU 2d Ann. Conference on Labor, 477, 479-480 (1949). Of three comments on the decision of the Third Circuit rejecting the Board's view, two upheld the court (*Comment*, 71 Harv. L. Rev. 1364 (1958); *Comment*, 5 UCLA L. Rev. 349 (1958)) and one upheld the Board (*Comment*, 33 NYU L. Rev. 619 (1958)). The court's decision was also approved in *Note: Special Labor Problems in the Construction Industry*, 10 Stanford L. Rev. 525, 535-539 (1958). The recent comprehensive *Note, Work-Assignment Disputes Under the National Labor Relations Act*, 73 Harv. L. Rev. 1150 (1960) considers the Board's interpretation of section 10(k) erroneous.

that the Act taken as a whole reveals that Congress did not mean what it plainly said in Section 10(k), it is appropriate to examine the legislative history of the Act to determine whether Congress ever expressed any such intent.

We believe from an examination of that history that Congress fully intended Section 10(k) to direct the Board to make determinations of work assignment disputes. From President Truman's first call for a procedure for "peaceful and binding determinations" of jurisdictional disputes to the final debate in which it was assumed that the bill provided for "the arbitration of work task jurisdictional disputes by the Board itself," there was a clear intent to give the Board more than the power to determine the existence of unfair labor practices. Fully aware of the history of jurisdictional disputes, of the fact that they tend to persist regardless of prohibitions, it added to the law a provision to "throw the issue into the field of administrative law." The legislative history set forth below, plainly supports the conclusion, drawn by the Second and Third Circuits, that the Board's interpretation of Section 10(k) negates what Congress intended.

In 1947, the insistent demand for a means of dealing with "jurisdictional disputes" before they led to strikes was recognized by President Truman in his State of the Union Message to the First Session of the 80th Congress.[10] Declaring that strikes arising out of disputes "involving the question of which labor union is entitled to perform a par-

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[10] The extended debates on what became the Labor-Management Relations Act of 1947 show lively concern with this issue. It is clear that Congress felt it necessary to deal with disputes between two unions in which the employers "are the helpless victims of quarrels that do not concern them at all." H. Rep. No. 245, 80th Cong., 1st Sess., pp. 23-24 (I Leg. Hist. 314-315). For the debates, see 93 Cong. Rec. 3329-3330, 3534, 3954, 4255-56, 4416, 5107, 5146-47, 7506, A1099, A1296 (II Leg. Hist. 583, 926-7, 993-7, 615, 1012, 1056-57, 1157, 1455, 1496-97), (References to "Leg. Hist." are to *Legislative History of the Labor-Management Relations Act, 1947* (GPO, 1948).

ticular task" should be curbed, he said, "When rival unions are unable to settle such disputes themselves, provision must be made for *peaceful and binding determinations* of the issues." 93 Cong. Rec. 137.

The bill that passed the House of Representatives on April 17 contained provisions making jurisdictional strikes illegal, without any procedure for determination of the underlying dispute.[11] Meanwhile, in the Senate, Senator Morse had submitted a bill (S. 858) proposing limited revisions of the 1935 Act. These included a provision, based on his experience as a member of the War Labor Board; at his suggestion, that Board had adopted a policy of requiring arbitration of jurisdictional disputes if not settled voluntarily within 24 hours. 93 Cong. Rec. 1910-11 (II Leg. Hist. 982-983). Section 8(b)(2)(A) of his bill would have made it an unfair labor practice for unions to engage in strikes over the assignment of particular work tasks. 93 Cong. Rec. 1912 (II Leg. Hist. 986). His Section 10(k) would have empowered the Board, or an arbitrator appointed by the Board, "to hear and determine the dispute out of which such unfair labor practice shall have arisen." 93 Cong. Rec. 1913 (II Leg. Hist. 987). Senator Morse

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[11] The bill, H.R. 3020, defined "jurisdictional strike" in Section 2(15) (I Leg. Hist. 169) and made such a strike unlawful in Section 12(3)(A) (I Leg. Hist. 205).

[12] The Senate Committee reported S. 1126 (I Leg. Hist. 99-157). The Senate ultimately passed the House bill, H.R. 3020, after substituting the complete text of S. 1126. 93 Cong. Rec. 5298 (II Leg. Hist. 1522). As passed by the Senate, Section 10(k) read as follows (I Leg. Hist. 258-9):

> (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have

made it clear that he was concerned with disputes over "work tasks" (93 Cong. Rec. 1910; II Leg. Hist. 981) and that the Board or arbitrator was "to settle the matter" (93 Cong. Rec. 1912; II Leg. Hist. 985).

The Morse proposal was incorporated without substantial change in the bill as reported to the Senate (I Leg. Hist. 113-4, 130-1) and as passed by the Senate (I Leg. Hist. 241, 258-9).[12]

There can hardly be any question that the Senate-approved version of Section 10(k) contemplated determinations of "work disputes," that is, of who should do the disputed work. That was plainly recognized in the Senate Committee Report on the bill, which said, "we have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within 10 days." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8 (I Leg. Hist. 414). See also p. 27 (I Leg. Hist. 433.[13]

Two points should be noted. First, the arbitration concept applied to, and could only apply to, resolution of the work assignment. (The question whether there has been an unfair labor practice, to which the Board now confines its determinations under Section 10(k), is not a matter for

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adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board.

[13] The Committee minority, although opposing the bill as a whole, approved this provision and similarly understood it as providing for "compulsory arbitration of jurisdictional disputes." S. Min. Rept. No. 105, 80th Cong. 1st Sess., p. 18 (I Leg. Hist. 480). They added, "We are confident that the mere threat of governmental action will have beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks . . .". *Id.* at 18-19 (I Leg. Hist. 480-1).

arbitration.) Second, the procedure was designed to settle disputes concerning "work tasks," not concerning unfair labor practices.

The meaning of the bill was further clarified in a colloquy between Senator Morse and Senator Ellender, a member of the Committee and a supporter of the bill (93 Cong. Rec. 4254; II Leg. Hist. 1054). Senator Ellender agreed that its provisions on jurisdictional strikes were based on the Morse proposal, that they were designed to "provide a fair procedure that will result in a settlement of the jurisdictional dispute," that the bill established "a procedure which would throw the issue into the field of administrative law" and that it gives a "method of dealing with the situation, which is through the Board, instead of by direct action on the part of the employer." 93 Cong. Rec. 4256 (II Leg. Hist. 1057).

The Conference Committee bill, which became the Act, followed the Senate Committee's treatment of the jurisdictional dispute problem in all major respects. Jurisdictional strikes were prohibited and the provision for determining jurisdictional disputes was retained. The chief changes were a substantial widening of the scope of the prohibition of jurisdictional strikes and elimination of the provision in Section 10(k) for appointment of arbitrators. The Conference Committee report, referring to Section 10(k), said "The Senate amendment also contained a new section 10(k), which had no counterpart in the House Bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes). The Conference agreement *contains this provision of the Senate amendment,* amended to omit the authority to appoint an arbitrator." (ital. supplied) H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57 (I Leg. Hist. 561).

Again, it should be noted (1) that the "disputes" that the Board is to determine are "between unions", not, as is usually the case with unfair labor practices, between a union and an employer, and (2) the disputes are those "giving

rise to unfair labor practices," not the unfair labor practices themselves. Most important, there is no indication that the Committee believed that the omission of the provision for arbitrators changed the nature of the "disputes" which the Board was to "determine."

When the conference report came before Congress, the only objection to Section 10(k) raised by opponents of the bill was the elimination of the provision for arbitrators. Thus, Senator Morse pointed out that "the Board will have to hear and decide the merits of the disputes in the motion-picture industry," as well as similar disputes elsewhere. 93 Cong. Rec. 6610 (II Leg. Hist. 1554). He urged that the Board was not the proper agency for "determining the merits of a jurisdictional dispute" (*ibid*). Senator Murray said that the section "in effect provides for the arbitration of work task jurisdictional disputes by the Board itself . . ." 93 Cong. Rec. 6665 (II Leg. Hist. 1585). This clear understanding that the Board itself would actually determine the merits of the work disputes was not challenged by supporters of the bill. Indeed, as we have seen, it was accepted in the Conference Committee's report.

The bill was likewise so construed by President Truman when he spoke, in his veto message, of the authority given to the Board "to determine jurisdictional disputes over assignment of work."[14] This view was not questioned by supporters of the bill in their discussion of the veto message.[15]

In sum, the intent of Congress in adopting Section 10(k) was to find a remedy for jurisdictional disputes. It re-

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[14] President Truman said: "The bill would force unions to strike or to boycott if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This peculiar situation results from the fact that the Board is given authority to determine jurisdictional disputes over assignment of work only after such disputes have been converted into strikes or boycotts." 93 Cong. Rec. 7501 (I Leg. Hist. 916).

[15] See, for example, the comments of Rep. Hartley, 93 Cong. Rec. 7506 (I Leg. Hist. 926-7).

jected a plan for simply prohibiting jurisdictional strikes and decided to combine such a prohibition with provisions for compulsory arbitration of jurisdictional disputes. Compulsory settlement by arbitration was at first proposed, with referral to arbitrators at the option of the Board. The referral to arbitrators was ultimately discarded, leaving the arbitration function to the Board itself. No one involved in the enactment of the legislation, whether in favor or in opposition, was in doubt as to the duty of the Board to settle the work allocation in dispute. The Board and the arbitrators were given the same substantive functions in the Senate Bill. Deletion of the option to appoint arbitrators in the Conference Report did not change the substantive functions of the Board.

If Congress had intended to limit the Board's action to the mere finding and prohibition of an unfair labor practice, Section 8(b)(4)(D) would have been enough. There would have been no Section 10(k). Section 8(b)(4)(D), or the House formula of an outright ban on jurisdictional strikes, would have stood alone. But all the evidence points to a different intent. The addition of Section 10(k), its genesis in the practice of the War Labor Board, and the words used by the legislators in their debates and reports, as well as the President's veto message—all these point to an independent function to be served by Board determinations under Section 10(k)—the resolution of disputes over work allocations.[16]

The Board makes virtually no effort to explain away this unusually clear legislative history. It says only that the remarks of opponents of a bill are not reliable indications of its meaning and it then offers what it calls an "equally plausible inference" that would justify its theory (p. 47). To draw this inference, it necessarily concedes that the

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[16] See also Farmer & Powers, *supra*, 46 Va. L. Rev., at 684: "This [legislative] history . . . clearly indicates that the Board was expected to decide how the disputed work should be allocated between the contending employee groups." Note, *supra*, 73 Harv. L. Rev. at 1156-7.

bill passed by the Senate did require arbitration of the work dispute by the Board or an arbitrator. It then theorizes that, after the Conference Committee broadened Section 8(b)(4)(D) to cover more than disputes between two unions, it must have decided that there was no longer any need for arbitration and that the Board should decide only whether "the striking union was entitled to claim the work under an outstanding order or certification" (p. 47).

Surely, if any such radical change in the procedure to be followed by the Board had been intended, something would have been said in the reports or debates. If the Senate had understood that the Conference Report had thrown out its plan to have the Board determine the underlying work dispute, there would have been some comment. Yet what we find is a lengthy discussion of the elimination of the provision for appointment of arbitrators, without anyone saying that this was a far too limited view of the change.

The Board's argument that no reliance can be placed on statements by opponents of a bill (p. 47) applies at best to the period after the Conference Committee Report. As we have seen, both sides fully understood that the earlier bill called for arbitration of work disputes. As to the subsequent period, we submit that the Conference Committee Report itself clearly shows agreement by the majority with the interpretation by opponents of the bill. It said that the Board was to "determine disputes between unions giving rise to unfair labor practices" (*supra*, p. 18). This is totally at odds with the Board's theory that the Conference Committee confined 10(k) determinations to "whether the striking union was entitled to claim the work under an outstanding order or certification" (p. 47). If that is what the Committee intended, it chose very inapt words to express itself.[17]

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[17] The remarks of Senator Taft relied on by the Board at page 28 dealt with the effect of the prohibition in Section 8(b)(4)(D) and not with the procedural effect of Section 10(k). The remarks quoted by the Board at p. 25 are discussed below, p. 48 n. 49.

In sum, the Conference Committee bill, which became the final Act, embodied the understanding of both sides in both houses of Congress, never abandoned, that the Board was to arbitrate disputes over work assignments.

D. THE BOARD HAS NOT BEEN CONSISTENT IN ITS INTERPRETATION OF SECTION 10(k)

The Board argues that its interpretation of Section 10(k), "first adopted shortly after the provision was added to the Act in 1947 and consistently adhered to thereafter," is entitled to weight as a "contemporaneous construction" (pp. 35-36). In fact, however, the Board has not been consistent and its present policy, which was adopted two years after the Act was passed, represents a reversal of its original interpretation.

1. The Board's Rules

The only "contemporaneous" (i.e., 1947) interpretation of Section 10(k) by the Board was its 1947 Rules which clearly envisaged work dispute determinations. Those Rules provided that the Board was "to certify the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform *the particular work tasks in issue*, or to make other disposition of the matter (*infra*, App. C)."[18]

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[18] The Rule set forth in the text was still in effect when the Board decided this case. In 1958, however, in apparent recognition that its policies had nullified the words "to certify" in its original Rules, the Board adopted new Rules which provided, in Section 102.80, that, after due hearing, the Board shall proceed "to determine the dispute or make other disposition of the matter" (23 C.F.R. 3259, 3270). This, of course, was a mere return to the language of Section 10(k).

It is difficult to see how the new Rule helps to "clear up any possible ambiguity" in the old Rule, as the Board now suggests (p. 51n). A regulation that merely restates the terms of the statute tells the reader nothing he did not know already.

The court below found that "there seems to have been no compliance with the Board's own rules, which recognize its power to allocate disputed tasks" (R. 112). The Third and Seventh Circuits reached the same conclusion. *United Association* case, *supra*, 242 F. 2d at 726; *United Brotherhood* case, *supra*, 261 F. 2d at 170-171. Indeed, the latter found it so compelling that it rested its decision condemning the Board's present practice primarily on that ground.

The Board argues that it has been following this rule because anything that it does can be brought in under the general clause, "to make other disposition of the matter." It says that it invokes the specific part of the Rule in those cases where the work assignment is governed by a Board order or certification or by a contract (pp. 50-51). Yet elsewhere, it urges that the "usual" 10(k) case does not fall in this category (p. 26). This means that the Board wrote a Rule specifically dealing with the "unusual" case and left all the "usual" cases to be dealt with under a catch-all clause that draftsmen ordinarily reserve for the situations they may not have anticipated. See Sec. 101.30 App. D.

A much more natural inference from the Rules drafted by the Board in 1947 is that it believed at that time that it would be deciding not only which "trade, craft or class of employees" was not entitled to the disputed work but also which group was.[19]

2. The Board's Decisions

This view is reenforced by the fact that the Board did follow the plain intent of its Rule in its first 10(k) determination in 1949. *Moore Drydock Co.*, 81 NLRB 1108. The Board now describes this case as deciding only that the losing union was not entitled to strike for the disputed work (p. 36). But the Board did more than that. It found

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[19] The failure of the Board to follow the plain intent of its Rules is an adequate, independent basis for sustaining the decision of the court below, as the Seventh Circuit held in the *United Brotherhood* case, *supra*.

also that the other union *was* entitled to the work assignment. This aspect of the determination in that case is totally inconsistent with the Board's present policy.

In the *Moore* case, one union held the contract with shipbuilders for machinist work on the east side of San Francisco Bay and another held the contract for such work on the west side. The latter union started picketing in an effort to get the work on the east side. The employer involved filed a charge under Section 8(b)(4)(D) and a hearing was held under Section 10(k). A three-man majority of the Board ruled that the Board was *required* to hold hearings under Section 10(k), that the respondent union's contract did not cover the east side and that therefore the respondent union did not have any lawful basis on which to claim the disputed work. It further held that the other union "was entitled to the work in dispute" (81 NLRB, at 1119). The Board then issued its formal Determination that (1) the respondent union was not entitled to force the employer to assign the work to it and (2) that the other union "was entitled to have Moore Drydock Company . . . assign the machinists work to its members" (*id.* at 1120).[20]

In its second decision under Section 10(k), *Juneau Spruce Corp.*, 82 NLRB 650 (1949), the Board dealt with a situation in which a union demanded that an employer allow its members to do certain work despite the fact that the union represented none of the employer's employees.[21] The Board held that the union's claim that it had traditionally done such work was irrelevant where the union has "no bargaining or any representative status" (82

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[20] Members Murdock and Houston dissented. Mr. Murdock would have held that Sections 8(b)(4)(D) and 10(k) were limited to controversies "over the proper allocation of particular work tasks as between different 'classes' of workers" (81 NLRB at 1123). Mr. Houston would have confined Section 10(k) to situations in which the employer was neutral as between the two unions.

[21] The same dispute was involved in this Court's decision in *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), discussed below at pp. 34-35.

NLRB, at 660). Noting that the employer had assigned the work in question "to its own employees," the Board said that Sections 8(b)(4)(D) and 10(k) "do not deprive an employer of the right to assign work to his own employees" (*ibid*). The Board's formal determination was to the effect that the respondent union was not entitled to force the employer to assign the work to its members. It did not here, or later, issue the kind of decision it issued in the *Moore* case, expressly finding that the successful union was entitled to the disputed work.[22]

A further constriction in the Board's administration of Section 10(k) occurred in *International Association of Machinists*, 83 NLRB 477 (1949). The Board there applied its rule to a situation where both of the unions involved had members working for the employer. The Board held that, since the employer had no controlling contract with either union, it was free to decide which of its employees were to do the work. The Board then took a further step away from making an affirmative disposition of work disputes by saying: "We are not by this action to be regarded as 'assigning' the work in question to the Machinists. Because an affirmative award to either labor organization would be tantamount to allowing that organization to require Westinghouse [the employer] to employ only its members and therefore to violate Section 8(a)(3) of the Act, we believe we can make no such award" (83 NLRB at 482). The Board said that, even if this meant that,

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[22] Again, two members of the Board dissented. Member Murdock would have issued no determination under Section 10(k), believing that this was not the kind of case to which that section applied. The majority, he said, had treated the case as though it were a representation dispute. The Congressional intent, he said, was that the Board "arbitrate" the matter by deciding which craft "ought" to do the work, not that it decide the "unarbitrable question" of who is doing the work (82 NLRB at 662, 3). Under the Board's rule, the decision would always go to the group that had received the employer's award. Member Houston concurred in this dissent (82 NLRB at 663, n. 22).

in most cases, the employer would decide the question by his assignment, it saw no way that it could overrule his decision.

3. The Winslow Case Rule

The principle thus established has since been applied in a number of cases.[23] Only a small proportion of these cases, however, involved situations in which both of the rival unions actually represented employees of the struck company. Where that has been the situation, the Board has frequently adopted a different approach, first applied in *Winslow Bros.*, 90 NLRB 1379 (1950). In these cases, the Board does make a determination of the underlying work dispute in a manner that is in obvious conflict with its general rule in 10(k) proceedings.

In *Winslow*, two unions held contracts with the employer covering different groups of workers. A dispute arose over which employees should perform a particular task. One of the unions struck when the employer awarded the work to members of the other. After the employer filed a Section 8(b)(4)(D) charge against the striking union, the Board held a Section 10(k) hearing. In its decision, it said that it regarded the dispute as one over "which of the two bargaining units[24] appropriately includes" the disputed work (90 NLRB at 1384). After reviewing the history of the two contracts and applying its usual criteria for determining bargaining units, it held that the disputed job "is included in the production and maintenance employees unit presently represented by" the respondent union and not in the unit represented by the union to whose members the employer had assigned the work (*id.* at 1385).

The Board has followed the procedure thus established

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[23] See, for example, *Middle States Tel. Co.*, 91 NLRB 598 (1950); *Central Roig Refining Co.*, 101 NLRB 77 (1952); *Charles E. Myles*, 107 NLRB 542 (1953); *Carrier Corp.*, 111 NLRB 940 (1955); *Denali-McCray*, 118 NLRB 109 (1957); *Southern New England Tel. Co.*, 121 NLRB 1061 (1958).

[24] Since neither union held a certification, the term used by the Board must be taken as applying to the areas covered by the two union contracts.

in a number of cases, without regard to which union had benefited from the employer's assignment.[25]

No effort has been made by the Board to explain how it reconciles this rule with its theory that it cannot go outside the limitations of Section 8(b)(4)(D). The rationale given in the cases is that, if the employer is bound by contract to give specified work to members of the contracting union, it would undermine the collective bargaining system to prevent unions from striking when an employer violates such a contract. *NBC* case, *supra*, 105 NLRB at 363-5.

However sound this practical consideration may be, the Board's adoption of a special rule in contract cases is administrative legislation, made necessary by the narrow view it takes of Section 10(k). Section 8(b)(4)(D) bars strikes to compel an employer to assign work to one group of employees rather than another except where an employer "is failing to conform to an order or certification of the Board . . ." The Board has added to this clause, "or valid collective bargaining contract," specifically rejecting "a literal construction of Section 8(b)(4)(D)." *NBC* case, *supra*, 105 NLRB at 364. If the Board were performing its intended function under Section 10(k), this legerdomain would be unnecessary.

The Board entirely fails to explain the *Winslow* rule in its brief. Where necessary to its argument, it simply ig-

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[25] The Board's award agreed with the employer's assignment in *Safeway Stores*, 101 NLRB 181 (1952); *Equitable Gas Co.*, 101 NLRB 425 (1952); *Ethyl Corp.*, 107 NLRB 463 (1953); *National Broadcasting Co.*, 105 NLRB 355 (1953); *Columbia Broadcasting System*, 114 NLRB 1354 (1955); and *Taliaferro*, 119 NLRB 287 (1957). It conflicted with that of the employer in the *Winslow* case and also in *National Broadcasting Co.*, 103 NLRB 479 (1953); *Columbia Broadcasting System*, 103 NLRB 1256 (1953); *American Broadcasting*, 110 NLRB 1233 (1954) and *Libby-Owens-Ford Glass Company*, 123 NLRB 1183 (1959). In the last named case, the Board appears to have ignored its requirement of an existing contract, but without explaining why. See 73 Harv. L. Rev. at 1154 n. 31.

nores the rule and speaks as though it always accepts the employer's determination unless it violates a Board order or certification (*e.g.*, pp. 32, 34, 47). This is convincing evidence that the Board's interpretation of Section 10(k) creates the very kind of inconsistencies that the Board insists it has avoided.[26]

4. Subsequent Congressional Action

The Board argues that its "consistent and unvarying" interpretation of Section 10(k) has been approved by Congress by its failure to amend this part of the Act during its sessions in 1949, 1953 and 1959 (pp. 40-43).

Principal reliance is placed on the events of 1949, when a new Congress convened with an apparent majority for revision of the 1947 Act. The Thomas bill described by the Board would have changed Sections 8(b)(4)(D) and 10(k) extensively—but not, as the Board suggests, by the insertion of a new concept of work dispute determinations. The revisions had two purposes: (1) restricting work dispute determinations to jurisdictional disputes in the narrow sense, and (2) permitting appointment of arbitrators. The hearings and reports show that everyone was assuming at that time that the Board *was* determining work disputes under Section 10(k). The Board had not yet issued its decisions nullifying that Section.

Thus, the Thomas bill, as described in the report of the majority of the Senate Committee on Labor and Public Welfare (S. Rep. No. 99, 81st Cong., 1st Sess.) would have retained a limited ban on jurisdictional strikes (pp. 6, 60, 66-7, 74) and contained detailed provisions for determination by the Board of disputes over work assignments, including restoration of the provision for Board appoint-

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[26] Another example of the inconsistencies bred by the Board's rule is described in Farmer & Powers, *supra*, 46 Va. L. Rev. at 666-667.

[27] The report was issued just six days after the Board's first decision under Section 10(k), described above (pp. 23-24). As there noted, it was not until after that decision that the Board adopted its present policy.

ment of arbitrators (pp. 4, 60, 68-69, 75).[27] Nowhere in this report is there any suggestion that these provisions would give the Board entirely new powers. The assumption throughout was that the Board was already deciding this issue under Section 10(k). The report of the minority of this Committee approved part of the majority's proposal (S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., p. 78). In reviewing experience under two years of the 1947 Act, the minority also assumed that the Board was determining work assignments under Section 10(k) (*Id.*, at pp. 33-34).

The Hearings held in February of 1949, and particularly the portions which the Board cites (p. 41-42), make it even clearer that no new procedure was intended. Board Chairman Herzog welcomed the proposed restriction of the provisions for determination of jurisdictional disputes to a narrow area because it would "lighten the Board's burden in this new and difficult field of governmental operations" (*Hearings*, p. 124). He also welcomed the provision for arbitrators as easing the Board's responsibility. The same understanding that no new area was being placed under the Board's jurisdiction underlies the testimony of Former Board Member Reilly (*Hearings*, pp. 847-848) and Secretary of Labor Tobin (*Hearings*, pp. 25-26).[28]

The 1953 hearings show at best limited discussion of this matter and ultimate failure of Congress to enact any legis-

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[28] The general original understanding of what Section 10(k) meant is revealed independently in the Plan for Settling Jurisdictional Disputes Nationally and Locally, entered into in 1948 by the Building and Construction Trades Department, AFL, the Participating Specialty Contractors Employer's Association and the Associated General Contractors of America, Inc. This plan provided, in Article VIII: ". . . the members and Chairman of the Joint Board shall tender to the National Labor Relations Board, their services as expert witnesses in any hearing held by the Board under the provisions of Section 10(k) . . ." This provision shows that both management and labor in the building industry, where jurisdictional disputes are particularly common, expected the Board to make determinations of the kind in which expert testimony on practices in the industry would be needed.

lation. In these circumstances, "the failure of Congress to amend the statute is without meaning for the purposes of statutory interpretation." *Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520, 529 (1947).

Finally, we come to 1959, when Congress did amend the Act without changing Section 10(k). The Board insists that that constituted approval of its policy. However, when Congress acted in 1959, the Board had interpreted Section 10(k) one way and two Courts of Appeals another. It is at least as likely that Congress approved the then uniform interpretation by the courts as that it approved the Board interpretation which the courts had rejected. Certainly, a position of the Board which had been rejected by all the Circuit Courts considering the same cannot be said to have been approved by Congressional silence.

Furthermore, the Board is wrong in describing the 1959 Act as embodying "extensive revisions" of the 1947 Act (p. 43). The 1959 Act was primarily aimed at internal union abuses, as is implied by its name, "Labor-Management Reporting and Disclosure Act of 1959." Only the last of its seven titles is devoted to amendments to the 1947 Act and those are confined to a few specific matters. No general overhaul of the 1947 Act was contemplated, or accomplished. The Board points to no evidence that Congress considered the matter of work dispute determinations.

We submit that this record gives the Board no basis for finding Congressional approval of its policy.

E. THE LANGUAGE OF SECTION 10(k) IS INCONSISTENT WITH THE BOARD'S PRACTICE OF HOLDING TWO HEARINGS ON THE SAME SUBJECT

It seems perfectly clear that Congress intended the Board to determine the work dispute in the 10(k) hearing and the entirely different unfair labor practice issue in a subsequent hearing under Section 10(b). The Board's theory, however, forces it into the ludicrous procedure of holding successive hearings on precisely the same issue.

Whenever a violation of Section 8(b)(4)(D) is charged, a hearing is held under Section 10(k), unless the preliminary investigation (made of all charges reveals that the charge is plainly without merit.[29] If a 10(k) hearing is held and the case comes to the Board for determination, it first considers whether there is "reasonable cause to believe" that a violation of Section 8(b)(4)(D) has occurred (see, for example, the Determination in this case, R. 18). If, at that stage, it finds no such "reasonable cause," it dismisses the proceedings wthout further findings.[30] If reasonable cause is found, the Board then "determines" the jurisdictional dispute but only in terms of whether the strike which was the basis of the charge was a violation of Section 8(b)(4)(D). It may, despite its previous finding of "reasonable cause," hold that the strike was permissible and issue its determination in those terms. Clearly, in such cases, the Board has decided the same issue it would decide in an unfair labor proceeding.

If the Board holds against the union, and the union fails to accept the Board's determination, the Board then holds a second hearing, under Section 10(b), on the unfair labor practice charge. In this hearing, it decides nothing new, as the decision in the present case shows (R. 2-14).

Under this arrangement, as the court below said, "the 10(k) hearing and determination become superfluous" (R. 109). The Third Circuit similarly noted that what the Board did in its first proceeding "was to make a decision stating merely that the coercive action of the [respondent union] . . . was illegal." *United Association* case, *supra*, 242 F. 2d at 724. It then went on to say (242 F. 2d, at 726):

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[29] The Board's refusal to hold a 10(k) hearing where the 8(b)(4)(D) charge is without merit was upheld in *Herzog v. Parsons*, 181 F. 2d 781 (C.A., D.C., 1950), cert. den. 340 U.S. 810.

[30] See, for example, *Ship Scaling Contractors Association*, 87 NLRB 92 (1942; *Anheuser Busch, Inc.*, 101 NLRB 346 (1952); *Lindsey Wire Weaving Co.*, 120 NLRB 977 (1958); *Mechanical Contractors Ass'n*, 120 NLRB 1611 (1958).

> We do not believe that Congress intended to require judicial enforcement to be preceded by successive administrative determinations of the existence of a particular unfair labor practice. The preliminary Section 10(k) determination *must have some different function.* The scheme makes sense only if the first hearing under Section 10(k) is concerned with an arbitration type settlement of the underlying jurisdictional dispute, so that a subsequent Section 10(c) unfair labor practice adjudication becomes necessary only if a union shall fail to respect the jurisdictional boundary which the Board has delineated.[31]

The Board's effort to show such a "different function" is very weak (pp. 21, 48-50). It admits that the question whether the striking union is entitled to claim the work "could be determined, as a matter of defense, in the 8(b)(4)(D) unfair labor practice proceeding" (p. 48). It argues, however, that the double procedure encourages settlement of disputes because settlement is easier to obtain in the non-adversary 10(k) proceeding than in the "harsher" atmosphere of the "formal" 8(b)(4)(D) proceedings (pp. 21, 50).

We doubt that parties to a 10(k) proceeding such as that held here find any less formality or harshness than in the empty 8(b)(4)(D) ritual that follows.

As every labor practitioner knows, voluntary settlements of Labor Board proceedings are vigorously encouraged by the regional offices of the Board. The parties are always at liberty to compose their differences without pressing for Board determinations. No additional statutory command is needed for this. In fact, it works so well that, as we show below (pp. 46-47), nine out of ten Board cases are settled without formal proceedings. The proportion of 8(b)(4)(D) cases settled without 10(k) hearings is ap-

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[31] See, also, Kovarsky, *The Jurisdictional Dispute*, 42 Iowa L. Rev. 509, 526 (1957), saying of the Board's procedure: "The second hearing, ordinarily, is merely to determine whether the union has obeyed the initial decision." Note, *supra*, 73 Harv. L. Rev. at 1156: "A reasonable Congress could hardly have intended such a fruitless undertaking."

proximately the same as the proportion of other cases settled without 10(b) hearings. Any slight improvement in the record of nine out of ten that might be obtained is hardly worth holding an extra hearing.

Moreover, if it was the purpose of Section 10(k) to encourage settlements, one would expect some hint of this in the voluminous debates and reports of the 1947 Congressional session. As we have shown, all the legislative history points to a different purpose.

In order to justify its deciding the 8(b)(4)(D) issue in its 10(k) determinations, the Board argues that Section 10(k) supplies no standards for the Board's action and that therefore resort must be had to the Act as a whole (p. 19). Thus, the absence of specific standards is the tenuous ground on which the Board reduces Section 10(k) to a mere "extra procedural step" (p. 34).

The absence of specific standards is the result of the legislative history of the section, described above. The section originally included a provision for optional referral of jurisdictional disputes to an aribtrator. While that provision was ultimately eliminated, it is clear that Congress intended the Board to function as an arbitrator in its handling of jurisdictional disputes and, accordingly, it was to draw upon the usual resources used by arbitrators in adjusting jurisdictional differences.[32] The Board was to

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[32] Board Member Murdock, dissenting in *Northwest Heating Company*, 107 NLRB 542, 554 (1953), stated:

> As I have indicated above, the legislative history demonstrates that Congress intended by Section 10(k) to give the Board the function of *arbitrating* jurisdictional disputes. As I stated in my opinion in *Juneau Spruce*, although the Act contains no standard to guide the Board in making such determination, the Congress must have known that custom in the trade and in the area, the constitutions and agreements of the contending labor organizations themselves, the technological evolution of the disputed task, and like criteria are those customarily employed by trade unions and interunion arbitrators in adjusting jurisdictional differences.

supply its own relevant standards of judging such disputes, on the basis of its own experience or the experience of other governmental agencies such as the War Labor Board. In much the same way, it has administratively developed criteria for establishing the "unit appropriate for bargaining" in the thousands of representation proceedings it has handled, even though no actual standards were supplied by Congress in the Act as originally passed in 1935.

We submit that the absence of specific standards is neither a warrant for ignoring the plain meaning of the language of Section 10(k) nor an excuse for failing to execute its mandate. Its absence poses no substantial or unfamiliar administrative problem.

F. THERE IS NO CONFLICT BETWEEN THE INTERPRETATION OF SECTION 10(k) BY THE COURT BELOW AND SECTION 303

Section 303(a)(4) of the 1947 Act made jurisdictional strikes "unlawful, for the purposes of this section only," and Section 303(b) permitted civil suits for damages caused by such unlawful conduct. In specifying the conduct condemned, Section 303(a)(4) followed the wording of Section 8(b)(4)(D) exactly.[33]. The Board claims that the construction of Section 10(k) here urged by respondent and supported by the court below creates a conflict between Sections 8(b)(4)(D) and 303 which the Board's construction avoids (pp. 29-35). This argument is conclusively answered by the decision of this Court in *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

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[33] The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, amended Section 303 by substituting for the detailed description of the conduct condemned in the section a simple provision making it "unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended."

1. *The Remedies Provided for Violations of Sections 8(b)(4)(D) and 303 (a)(4) are Independent of Each Other.*

The gist of the *Juneau Spruce* decision was that the remedies specified in the two sections for the same conduct "were to be independent of each other. Certainly, there is nothing in the language of §303(a)(4) which makes its remedy dependent on any prior administrative determination." 342 U.S. at 244. The union argued that, until the Board condemned its conduct in a 10(k) proceeding, it could not be found in violation of Section 303(a)(4). This Court held, however, that Section 10(k) is "only a limitation on administrative power" (342 U.S. at 244). The Board would turn this decision around and treat it as equating the two sections, holding Section 10(k) a limitation on neither (p.34). Obviously, that is not what this Court held.

There is nothing inherently incongruous in allowing different results in different proceedings arising out of the same incidents. Congress was expressly warned that District Courts hearing Section 303 cases and the Board administering Section 8 would sometimes reach different conclusions on the same evidence. S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., p. 13, I Leg. Hist. 475; 93 Cong. Rec. 5042, II Leg. Hist. 1358.[34] It is not surprising to find that that has since occurred.[35]

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[34] A comment on the *Juneau Spruce* decision concluded that Congress "latently contemplated that a different result might follow from a Section 303 procedure than from an administrative procedure." *Comment*, 51 Mich. L. Rev. 307, 309 (1952).

[35] For a particularly striking example, compare the companion cases, *United Brick and Clay Workers v. Deena Artware*, 198 F. 2d 637 (C.A. 6, 1952) and *National Labor Relations Board v. Deena Artware*, 198 F. 2d 645 (C.A. 6, 1952).

2. *The Term "Order," as Used in Sections 8(b)(4)(D) and 303(a)(4), Includes Determinations Under Section 10(k).*

We submit, further, that both Section 8(b)(4)(D) and the parallel provisions of Section 303(a)(4) can be limited by determinations under Section 10(k). Both sections are inapplicable when the employer "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing" the disputed work.[36] We believe that the term "order," as here used, includes a 10(k) determination.

The Board states that the term "order," as used in the two sections, means an order in an unfair labor practice proceeding (pp. 22, 24). However, it cites only two cases for this, both of which construed the word as it is used in Section 10(f), the provision in the original 1935 Act for court review of unfair labor practice proceedings. There is nothing in those decisions that requires that the same limitation be placed on the term where it appears in an unrelated amendment added twelve years later.[37]

There is convincing evidence that the determination of jurisdictional disputes under Section 10(k) was from the start viewed as a Board order within the meaning of Section 8(b)(4)(D). The bill, as reported to the Senate and

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[36] As noted above (p. 34 n. 33), this provision in Section 303 was amended in 1959 by eliminating the detailed language and incorporating Section 8(b)(4) by reference.

[37] In one of the two cases cited, *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940), this Court took pains to say, "we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders'." 308 U.S. at 408. The Court in that case passed only on the kind of order "for which the review in court is provided" (*ibid*).

as later passed by it, contained a prohibition of jurisdictional strikes subject to the exception as to Board orders and certifications (I Leg. Hist. 113-4, 241). The accompanying provision in Section 10(k) for determinations of work disputes by the Board or an arbitrator appointed by the Board provided that: "The award of an arbitrator shall be deemed a final order of the Board" (I Leg. Hist. 131, 259). While this provision was necessarily dropped when the Conference Committee struck out the provision for arbitrators, it shows that the Board determination was regarded as an "order." Thus, it is plain that those who drafted both the original Section 10(k) and the limitation in Sections 8(b)(4)(d) and 303(a)(4), with its reference to a Board "order," regarded the 10(k) determination as an "order," as that term is used in the other two sections.

Such an order can be one determining a "bargaining representative." Section 10(k) determinations do have that effect even as now made by the Board. The Board describes its practice of making determinations in cases where there is an existing contract as the determination of "which of the two existing bargaining units appropriately includes" the disputed work.[38] It explains its policy of making such determinations on the theory that "a union may derive representative rights from a contract as well as from a certification or bargaining order." *Newark & Essex Plastering Co.*, 121 NLRB 1094, 1109, n. 37. Thus, the Board's determinations in such cases can be regarded as "determining the bargaining representative for the employees performing such work," as those words are used in Section 8(b)(4)(D). If a determination of the work dispute over remote lighting had been made here, it would similarly have been a determination of "the bargaining representative." *Farmer & Powers, supra*, 46 Va. L. Rev. at 696-7, also at 691.

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[38] *Winslow* case, *supra*, 90 NLRB at 1384. The same language is used in subsequent cases. See, e.g., *Libbey-Owens-Ford Glass Company*, 123 NLRB 1183, 1188 (1959).

In short, the "different function" which the Third Circuit found in Section 10(k) is to afford a means of determining a jurisdictional dispute with the view of either terminating a jurisdictional strike in the event the parties abide by the determination or of ascertaining the propriety of a continuing jurisdictional strike in the event that the unsuccessful parties refuse to abide by the Board's determination. It should be noted, in this connection, that the statute does not forbid jurisdictional strikes, as such. Such strikes are regarded as allowable, under both Section 8(b)(4)(D) and Section 303, where an employer "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work" (Section 8(b)(4)(D)). Thus, a continuing jurisdictional strike consistent with a Board order favorable to the striking employees as a consequence of a 10(k) determination would not constitute an unfair labor practice under Section 8(b)(4)(D). Under this view of the law, the effect of a 10(k) determination would not be the imposition of a legal requirement on the employer to assign the work in accordance with the National Labor Relations Board's determination. Rather, it would serve to distinguish between allowable and prohibited economic activity by labor organizations.[39]

3. *The Provisions for Enforcement of Sections 8(b)(4)(D) and 303(a)(4) are Designed to Serve Different Purposes.*

Whether or not Section 10(k) alters the scope of the prohibitions of Section 8(b)(4)(D), it clearly limits remedial Board action under that Section. The Board conceded this in its brief *amicus curiae* in the *Juneau Spruce* case, *supra*, when it said: "In this view Section 10(k) does not

[39] It might be argued further that a Board determination under Section 10(k) would be a defense to an action under Section 303 for damages resulting from a jurisdictional strike *prior* to the determination, if the Board ruled that the striking union was entitled to the disputed work. However, that question need not be decided here.

constitute a modification of the unfair labor practice defined in Section 8(b)(4)(D), but rather imposes a limitation upon the power of the Board to remedy such unfair labor practices pursuant to Section 10(b) and (c)." (Brief for the Board, Oct. Term, 1951, No. 270, pp. 10-11; see also pp. 16-22.) This view of Section 10(k) as a limitation on the Board's power is entirely inconsistent with the Board's present position that Section 10(k) provides merely an "extra procedural step" (p. 34). This downgrading of Section 10(k) is compelled by the Board's pursuit of a "substantive symmetry between 8(b)(4)(D) and 303(a)(4)" (p. 34) that Congress clearly did not intend.

The independence of the procedure under the two sections established by this Court in the *Juneau Spruce* case, *supra,* is a necessary corollary of the difference between a private action to obtain recompense for injuries and a remedial administrative proceeding brought in the public interest. As the court below said (R. 111):

> It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process.

The Board argues that Sections 8(b)(4)(D) and 303(a)(4) prohibit the same conduct and that Section 10(k) does not limit either section (p. 34). It supports this by pointing out that Section 10(k) was added to the procedural provisions of the Act instead of being inserted as a limitation on the prohibitions of Section 8 (p. 24). But even if it is true that Section 10(k) does not affect what conduct constitutes a violation of Section 8(b)(4)(D), it certainly limits the area in which the Board may take remedial action under that section. It is not unusual for Congress to achieve such substantive results by clauses limiting resort to administrative processes.[40]

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[40] Just such limitations were incorporated in Sections 9(g) and 9(h) of the 1947 Act which barred resort to the benefits of the Act by unions that had not filed financial reports and non-Communist affidavits.

The Board's argument entirely ignores the difference in the ends sought to be achieved by Sections 10(k) and 8(b)(4)(D). Section 10(k) furnishes a vehicle for settling jurisdictional disputes. It has nothing to do with proscribing action in furtherance of jurisdictional claims. It does not penalize parties to the dispute. It is unique in the Act because its function is to settle a controversy that has provoked unfair labor practices. If settlement fails, action can still be taken under Section 8(b)(4)(D). If a cause for damages exists, action can be taken under Section 303. Section 10(k) would impose no greater limitation on Section 8(b)(4)(D) under our view than it does now under the Board's view, when Section 8(b)(4)(D) proceedings may be dismissed on voluntary settlement, agreement on a mode of voluntary settlement or acceptance of the Board's determination.

This Court held in *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, that "The general terms of Section 8(c) appropriately give way to the specific provisions of Section 8(b)(4)." 341 U.S., at 704-5.[41] Here, it is Section 10(k) that is specific and hence controlling. In unmistakable terms, it directs the Board to determine jurisdictional disputes and bars it from proceeding on the unfair labor practice charge if its determination is accepted.

In adopting Section 10(k), Congress was well aware of the persistent nature of jurisdictional disputes. It knew that they tend to continue despite the most explicit condemnations and prohibitions. It was no doubt aware that even heavy damage awards would not prevent recurrence

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[41] The Board argues (p. 35n) that this Court's decision in *the Electrical Workers case*, bars all divergence between proceedings under Sections 8 and 303. However, this Court there stressed that the interpretation it rejected would have given different meanings to the same words, "induce or encourage," as used in the two sections (341 U.S. at 703). Note: 73 Harv. L. Rev. 1157 suggests a strike to secure disputed work in accordance with 10(k) determination would be "compliance."

of jurisdictional strikes over the same issues. Hence, it provided for governmental "arbitration" of the jurisdictional disputes themselves, while at the same time "setting apart for private redress, acts which might also be subjected to the administrative process" *Juneau Spruce*, case, *supra*, 342 U.S. at 244. That is the fundamental plan that the decision of the court below would restore.

G. THERE IS NO CONFLICT BETWEEN THE INTERPRETATION OF SECTION 10(k) BY THE COURT BELOW AND SECTIONS 8(a)(3) AND 8(b)(2)

The Board asserts that the interpretation of Section 10(k) by the court below would result in discrimination based on union membership and union pressure for such discrimination, in violation of Sections 8(a)(3) and 8(b)(2) of the Act (pp. 26-27. There are several answers to this.

1. *No Discrimination Would Result in the Instant Case.*

The Board's arguments about possible discrimination ring false in the circumstances of the present case. As the court below noted (R. 111), "in view of the nature of the disputed tasks here involved it is improbable that any employees will be displaced," i.e., discriminated against on the basis of their union membership. The employer, CBS, is completely unionized. The remote lighting which is disputed is only a very small part of the work performed by either union involved. No one will be displaced and no one will have to change his union affiliation if an affirmative award of work jurisdiction is made.

The Board need not even make its determination in terms of the unions involved. It may resolve the jurisdictional dispute in terms of crafts, holding that the remote lighting should be done by technicians or by stagehands.[42] Or it may speak in terms of bargaining units, as it has done in the *Winslow* type of determination. In both cases, it would be making determinations in terms of which group of men already working for the employer should perform

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[42] This approach is suggested by former Chairman Farmer. *Farmer and Powers, supra*, 46 Va. L. Rev. at 684, 685-690 and also in Note, *supra*, 73 Harv. L. Rev. at 1157.

the disputed task. The Board now does this where a certification exists, under the express terms of Section 8(b)(4)(D). It does the same where a contract exists under the *Winslow* rule. It could take the further step of making such determinations where no certification or contract covers the disputed work, as in this case, but where both disputing unions have members employed by the company.

If it did so, it would no longer be necessary for it to invent special reasons for bringing the *Winslow* type of situation under statutory language that plainly does not cover it. One rule, bottomed on the plain language of Section 10(k), would cover all cases.

The Board, however, directs its arguments to the situation involving a "stranger" union which does not represent any of the employer's employees.[42a] It urges that, since most 8(b)(4)(D) cases involve such unions, that situation should determine the governing principles (p. 26).[43] But administrative decision making is not so blunt an instrument that it cannot distinguish between clearly distinguishable situations. There are many possible approaches to the

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[42a] In the building and construction industry, the construction job is the nexus of the various contractors and trades engaged or to be engaged in the completion of the job. Congress provided special treatment for the unique facts in this industry by its enactment of Section 8(f). A construction trade which is not actually engaged on the job at the particular time the jurisdictional dispute arises can hardly be considered a "stranger" union. See 73 Harv. L. Rev. 1150, 1153 n. 24 and see 93 NLRB 1081 n. 4.

[43] It should be noted that the Board fails to explain how its approach to Section 10(k) avoids the discrimination which it believes inevitable under the decision below. If discrimination may result from determinations under Section 10(k) in cases such as this, it may equally result from determinations based on certifications or contracts such as the Board now makes. Discrimination may also result from voluntary adjustments settling jurisdictional disputes; yet, such adjustments are encouraged by the Act. This weakness in the Board's case is commented on in Note, *Special Labor Problems in the Construction Industry*, 10 Stanford L. Rev. 525, 538 (1958); Farmer and Powers, *supra*, 46 Va. L. Rev. at 674.

stranger union situation. It is sufficient to suggest one that is implicit in what was said above.

If Board determinations were made in terms of crafts, rather than unions, the employer would remain free to hire or assign members of any union or of no union to the task, provided they had the requisite craft training. Where a particular union had an agreement with the employer covering the work in question, the Board's determination would have the effect of making that union the representative of whatever employees were assigned to the work. If the work did not take the full time of the employee, so that he would be engaged part-time on work covered by another union contract, the Board could regard the employee as represented by both unions. (See Feldesman, *supra*, 6 Syr. L. Rev., at 248).

This approach is not novel. As Professor Cox has pointed out, it is already in effect under the Joint Plan governing jurisdictional disputes in the construction industry. In a brief submitted to the Board in 1957, parts of which are set forth in the Appendix below (pp. 1a-4a), he showed that the Joint Board treats disputes as being conflicts among "crafts or callings" rather than unions. He suggested that, if the Board made work dispute determinations, an award to "electricians," for example, "would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policy of Sections 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions" (*infra*, pp. 3a-4a).

However, the rule applicable to stranger union cases need not be decided here. The only question now presented is whether the Board may abdicate its function under Section 10(k) in a case such as this where two unions are presently recognized by the employer for two different crafts and a jurisdictional dispute arises over work that may be done by either of the crafts they represent.

2. *If Conflict Exists, Section 10(k) Controls*

If application of Section 10(k) according to its plain

meaning does sometimes conflict with Sections 8(a)(3) and 8(b)(2), then Section 10(k), which deals specifically with a special narrow class of cases, must control. The court below properly concluded that: "Congress has apparently adjudged that this interest is outweighed by the policy of settling jurisdictional disputes" (R. 111). The same position was taken by the Third Circuit in the *United Association* case, *supra*, 242 F. 2d, at 727.

There is nothing in the history of the Act, from 1935 on, to indicate that the non-discrimination principle embodied in Section 8(a)(3) is not to be subjected to any limitation whatever. It was limited even in the 1935 Act by the closed shop proviso, under which employee freedom of choice could be limited by the union and the employer. In enacting Section 10(k), Congress may well have decided to give governing weight, in this one narrow area, to the goal of "minimizing or eliminating the wasteful practices that result from such [jurisdictional] conflicts, as well as the protection to which the employer and all other concerned parties are entitled once the representative has been selected." Cole, *Interrelationships in the Settlement of Jurisdictional Disputes*, 10 Labor L. Journ. 454, 456 (1959).

We have argued above that work dispute determinations can be made without causing discrimination based on union membership. If we are wrong in this, it inevitably follows that such discrimination must also occur under the Board's present practices. On the Board's theory, contract case determinations under the *Winslow* rule must result in assigning employees to or withdrawing them from specific jobs on the basis of union affiliation. Indeed, this may also occur whenever the Board rearranges bargaining units determined at earlier dates and under different circumstances.[44]

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[44] If it is true, as the Board suggests, that discrimination can be avoided in such situations because the union "may undertake to represent the employees already assigned to the work without requiring them to become union members" (p. 27n), the same adjustment can be made here.

In such cases, the employer's action is taken in compliance with a Board certification or determination. There is every reason to believe that Congress intended that the strictures of Section 8(a)(3) would not apply to such an action. That section, we submit, does not restrict actions by an employer in accordance with a Board determination under Section 10(k) even if the same action taken by the employer on his own motion would be illegal.

3. *The Employer's Right to Assign Work is Subject to the Requirements of the Act.*

The Board repeatedly asserts an inherent and inviolable right of the employer "to decide who his employees shall be and what work he shall give them" (p. 24). That argument makes little sense in this case. CBS made no selection of individual employees here. It made a choice between unions, with no regard to the individual workers involved (*supra*, pp. 3-4).[45]

The cases cited by the Board (p. 24) are no authority for the alleged absolute employer freedom to assign work. They establish only that the employer is free to hire and fire for reasons other than those forbidden by the Act. Nothing in the Act or in the cases speaks of employer freedom to assign work.

Undoubtedly, in the absence of special circumstances such as a statute or contract, the employer does have that freedom. However, just as the employer's freedom to hire and fire is restricted by Sections 8(a)(3) and 8 (b)(2), in the interest of stable labor relations in interstate commerce, so an employer's freedom to assign work to employees of his own choice is limited by the policy requiring compul-

[45] The Board found that CBS assigned the lighting work in dispute here to "its Stage Hands, in Local 1's unit" (R.4, 16-17). The reference to this finding in the Board's brief (p. 5) as an assignment "to its stagehands, who were members of IATSE" (p. 5) could be misunderstood. As the record shows, the assignment by Vice-President Fitts was "to Local No. 1," not to any specific CBS employees (R.22-23).

sory settlement of jurisdictional disputes when voluntary methods have failed. However strong the Board's reluctance to face the fact that in this narrow respect our national labor policy was changed in 1947, the statute requires that it consider interference with the employer's arrangements whenever jurisdictional disputes interrupt the free flow of interstate commerce. To ignore this is to ignore the plain meaning and purpose of Section 10(k).

The Board offers no evidence to show that Congress placed the employer's right to assign employees beyond reach even of the machinery to resolve jurisdictional disputes provided in Section 10(k). It concedes that the employer's right to assign work is curtailed in the case of Board orders and certifications (pp. 22, 32, 34) and, as we have shown, it has created an additional limitation in the case of existing contracts. The Board has explained this extension on the theory that "since the right to particular work may arise from a collective bargaining agreement as well as from a Board order or certification," the Board may override an employer's assignment that violates a contract (p. 22). But if "the right to particular work" can arise from a contract, it can also arise from a Board determination under Section 10(k). Under this interpretation, the employer's right to assign work is not subject to government dictation; it becomes the subject of economic contest if the union winning the 10(k) determination elects to dispute the employer's contrary assignment.

H. THE BOARD HAS FAILED TO SHOW THAT ITS INTERPRETATION FURTHERS THE PURPOSE OF SECTION 10(k)

The Board states that its interpretation of Section 10(k) has advanced the Congressional intent to encourage voluntary settlements and argues that it has worked well in practice (pp. 43-46). The evidence it offers is unpersuasive on a number of counts.

1. The Board states that, of 1,181 Section 8(b)(4)(D) cases in 12 years, all but 95 have been settled informally

without the need of a 10(k) hearing (p. 44). But it has always been true of Board operations that the great bulk of all unfair labor practice cases have been settled informally. The Board's figures on 8(b)(4)(D) cases show an informal settlement rate of 91.9%. The overall rate of settlement in unfair labor practice cases in the same period is 89.1%.[46] The difference is not striking.

Indeed, we might expect a greater difference in view of the nature of 8(b)(4)(D) cases. Jurisdictional disputes tend to be ephemeral because the employer usually gets the job done somehow or other even before the Board's preliminary investigation is finished.

The Board also relies on the fact that in only 14 of the 95 cases in which it held 10(k) hearings was it required to go through an unfair labor practice hearing (p. 45, n. 29). That is only to be expected in view of the fact that the second hearing serves no useful purpose.

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[46] The Annual Reports of the National Labor Relations Board for the fiscal years 1948 through 1959 (G.P.O., Washington, D.C.) show the following figures:

Unfair Labor Practice Cases Closed

Fiscal Year	*Total*	*Before Issuance of Complaint*	*Percentage*
1948	3,643	3,382	92.8%
1949	4,664	4,199	90.0
1950	5,615	5,098	90.8
1951	5,503	4,800	87.3
1952	5,387	4,778	88.7
1953	5,868	5,103	87.0
1954	5,962	4,975	83.4
1955	6,171	5,329	86.4
1956	5,619	5,030	89.5
1957	5,144	4,444	86.4
1958	7,289	6,654	91.3
1959	11,465	10,685	93.2
TOTALS	72,330	64,477	89.14

2. The Board says that our interpretation would encourage strikes, because unions must strike to get 10(k) determinations and anything that encourages them to use 10(k) would cause strikes (p. 25). But if Congress wrote the Act in a way that requires a strike before Section 10(k) goes into effect, it is hardly appropriate for the Board to nullify that Section in order to correct what it views as a Congressional error.[47]

On the other hand, the Board says, its interpretation encourages unions with jurisdictional problems to file representation petitions under Section 9 (p. 25). But the Board does not show that it has ever decided a jurisdictional dispute in a representation proceeding. In fact, it is the Board's policy not to do so.[48] Even today, there is no relief that respondent union could obtain by filing such a petition about the remote lighting dispute.[49]

3. By leaving the resolution of jurisdictional disputes to employers, the Board's interpretation invites prolongation of chronic disputes. Board "determinations" under its

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[47] If it was an error. Congress has corrected it by amending the introduction to Section 8(b)(4) by making it an unfair labor practice to *threaten* to strike because of a jurisdictional dispute. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, Sec. 704.

[48] *Libbey-Owens-Ford Glass Co.*, 41 NLRB 574 (1942). See also *American Broadcasting Co., Inc.* 112 NLRB 605, 607 (1955); *Plumbing Contractors Ass'n*, 93 NLRB 1081, 1087 (1951); *General Aniline & Film Corp.*, 89 NLRB 467 (1950); *Employing Plasterers Ass'n.*, 118 NLRB 17 (1957).

[49] The Board cites Senator Taft as supporting resort to representation proceedings in such cases (p. 25). The short answer is, "the Senator was wrong." Farmer & Powers, *supra*, 46 Va. L. Rev. 697. Moreover, even though Senator Taft apparently thought work dispute determinations could be obtained in representation proceedings, he certainly did not imply that they could not be obtained through Section 10(k).

present rule are useless since they are little more than a description of what the employer has done in a particular situation. They have no effect when the same situation arises in a different plant, or even in the same plant, as long as employers "can be as inconsistent as they please" (R. 83). Thus the Board's approach vitiates Section 10(k) in practice, as well as in theory.

Contrary to the Board's rosy view of the effect of its policy, it does not promote settlements. The National Joint Board which the Board cites as an example of its good works (pp. 43-44) has condemned the Board's administration of Section 10(k) in these words (*infra*, p. 1a):

> It is the considered opinion of the Joint Board that the doctrine of the *Los Angeles Building and Construction Trades Case* [cited *supra* (p. 25) as *International Association of Machinists*, 83 NLRB 477] is a serious, continuing threat to the success of the Joint Board, and that the widespread application of the doctrine would precipitate increased jurisdictional warfare.
>
> One reason for this conviction is the awareness that the doctrine is a constant temptation to contractors to disassociate themselves from the Joint Board. . . .

Specifically condemning the Board's adherence to the employer's resolution of work disputes, the Joint Board said (*infra*, p. 3a):

> It is contrary to the basic philosophy of collective bargaining to deny employees the opportunity to participate effectively in making decisions so important to their own interests.

Former Board Chairman Guy Farmer has concluded:

> The weakness in the NLRB policy from the standpoint of private agencies, such as the Joint Board, is that it provides a continual inducement to employers to abandon voluntary methods of settlement and to remain free to secure NLRB determinations supporting

their work assignments when they have not acted contrary to a certification, order or current contract.[50]

4. As against these adverse criticisms of the Board's rule in practice, the Board offers virtually no critical support. To show that Section 10(k) has worked well, it cites the

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[50] Farmer and Powers, *supra*, 46 Va. L. Rev. at p. 671. Other commentators agree. See Kovarsky, *The Jurisdictional Dispute*, 42 Iowa L. Rev. 509, 529 (1957): "The underlying philosophy of the *Irwin-Lyons Lumber Co.* and *Juneau Spruce Corp.* cases has unquestionably added to the number of jurisdictional quarrels." Testimony of Prof. Archibald Cox at *Hearings of Senate Committee on Labor and Public Welfare on Proposed Revisions of the LMRA*, 83rd Cong., 1st Sess., Pt 4, p. 2429: "Fourth, the policy tends to undermine the [construction] industry's own method for eliminating jurisdictional disputes." See also pp. 2415, 2419-20. *Comment*, 5 UCLA L. Rev. 349, 352 (1958): "Since the decision [of the Third Circuit in the *United Association* case, *supra*] will require the Board to determine the jurisdictional dispute on the merits, it should result in fewer disputes coming before the Board." Dunlop, *Jurisdictional Disputes*, in NYU 2d Ann. Conf'ce on Labor, 477, at 480: "There could be no more fertile way to stimulate jurisdictional disputes."

The position of the employer is further enhanced by the Board's rule regarding the "voluntary adjustment" aspect of Section 10(k). According to the Board, Section 10(k) is not satisfied by such adjustments, or methods of adjustment, unless they are accepted by the employer. See, for example, *United Ass'n. of Journeymen*, 108 NLRB 186, 196-7 (1954). Thus, even if the two unions involved have entered into and regularly observed a method of resolving jurisdictional disputes, the Board will proceed with its 10(k) and 8(b)(4)(D) hearings unless the employer is also a party to the agreement. And in such proceedings, under the rule here challenged, it will enforce the employer's decision. An employer facing the alternatives of either entering into or staying out of an adjustment agreement knows that, if he stays out, he will retain a free hand to make work assignments that the Board will enforce. There is therefore little inducement to him to enter into agreements. This aspect of the Board's policy is criticized in Cole, *Interrelationships in the Settlement of Jurisdictional Disputes*, 10 Labor Law Jour. 454, at 456, 459 (1959).

1948 *Report of the Joint Committee on Labor-Management Relations* (p. 45) and the early 1949 testimony of Former Board Member Reilly (p. 42). Both of these, however, antedated the Board's adoption of its present policy.

The Board also refers to the 1953 hearings on amendments to the Act and states that witnesses testified both "against and in favor of" its interpretation of Section 10(k) (p. 42). Of the three witnesses referred to, one was neutral[51] and the other two were critical. One of the critics, J. Paul St. Sure, President of the Pacific Maritime Association, had this to say of the Board's practice:

> The Board has consistently failed to settle jurisdictional issues when presented to it. Although the law directs the Board to determine the dispute out of which interunion picketing arises, it has instead issued "determinations" that one or both of the unions have no right to use picketing to gain their demands. *This action obviously ignores the issue that is the source of the trouble.* The crucial issue is which groups of workers should do the work, not whether one or the other is entitled to use picketing to support its claim to the work. To protect the public against these disputes, there must be a determination as to who should do the work. *The Board avoids the issue; it does not determine it.*[52]

5. We need look no further than the situation at CBS to see how the Board's rule works in practice. When the two unions called upon CBS to resolve the dispute out of which the unfair labor practices arose, CBS took the position that it "was not free to make a commitment where

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[51] This is the testimony of J. S. O'Donnell, President of the National Constructors Association. *Hearings Before the Committee on Labor and Public Welfare, U.S. Senate, on Proposed Revisions of the Labor-Management Relations Act, 1947*, 83rd Cong., 1st Sess., pp. 1347-9. The best he said for the Board was: "The decisions by the Board in many cases have been fair and have been well received" (p. 1348).

[52] *Id.*, at p. 1336. The other witness referred to is Professor Cox, whose testimony on this matter is described above (p. 50, n. 50).

there were conflicting claims" (R. 28; see also R. 30). This left the whole matter up in the air, with the employer deciding each case as it came along. It is difficult to imagine a situation better calculated to perpetuate turmoil. Yet it is the necessary result of the Board's view that it has no power to interfere with the employer's resolution of such matters.

It is not surprising, therefore, to find that CBS has repeatedly been plagued by these problems. Differences between respondent and IATSE on three different issues have survived to the point of Board determinations. 103 NLRB 1256, 114 NLRB 1354 and the present case. The very issue involved here, remote lighting, gave rise to another case when IATSE struck against an assignment by CBS to respondent. *Theatrical Protective Union No. 1 (Columbia Broadcasting System, Inc.)* Case No. 2-CD-161. In that case, IATSE eventually yielded.

A Board determination of the merits of this jurisdictional dispute would resolve this situation as Congress intended and would thus execute the legislative command to reduce jurisdictional strikes in interstate commerce.

CONCLUSION

We submit that the Board's interpretation of Section 10(k) ignores the plain meaning of the Act, conflicts with the legislative history, subverts the statutory design for handling jurisdictional disputes, abandons to the employer the responsibility given to the Board by Congress with respect to such disputes, involves the Board in inconsistencies that deprive its rulings in this area of any presumptive validity and has been criticized as both wrong in law and unsatisfactory in practice by disinterested observers. The decision of the court below carries out the plain meaning of Section 10(k) and effectuates the Congressional purpose to reduce jurisdictional strife. It should therefore be affirmed.

Respectfully submitted.

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